

HONORABLE JAMES L. ROBART

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,

Plaintiff,

v.

MOTOROLA INC., et al.,

Defendant.

No. C10-1823-JLR

MICROSOFT'S OPPOSITION TO
DEFENDANTS' MOTION TO
EXCLUDE AND STRIKE TESTIMONY
OF TODD MENENBERG

Noted: July 31, 2013 at 10:00 AM

MOTOROLA MOBILITY, INC., et al.,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

ORAL ARGUMENT REQUESTED

MICROSOFT'S OPPOSITION TO
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STRIKE TESTIMONY OF TODD MENENBERG

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1 **I. INTRODUCTION**

2 Microsoft expert Todd Menenberg is a Certified Public Accountant who manages
 3 Navigant Consulting's Disputes and Investigation Practice for the Western Region of the
 4 United States. Microsoft retained Menenberg to quantify the legal costs, including attorney's
 5 fees and other litigation costs and expenses, incurred by Microsoft due to Motorola's alleged
 6 breach of contract. In addition, Microsoft's counsel retained Menenberg to quantify the costs
 7 Microsoft incurred to relocate its primary logistics and product/software distribution center for
 8 the European, Middle Eastern, and African ("EMEA") market from its former location in
 9 Germany to the Netherlands. Menenberg's analysis includes an assessment of Microsoft's
 10 increased costs resulting from operating its distribution center in the Netherlands. Menenberg
 11 has testified as an expert in numerous cases involving financial disputes and on the subject of
 12 damages.

13 To prepare his opinions, Menenberg and a supporting staff of 10 people spent more
 14 than 1,000 hours (with Menenberg himself spending over 100 hours)¹ reviewing and analyzing
 15 more than 4,000 pages of invoices from 5 law firms, containing more than 12,000 billing
 16 entries, as well as voluminous invoices and other cost documentation relating to the relocation
 17 of Microsoft's distribution center to ascertain the nature and amount of Microsoft's claimed
 18 damages. Menenberg also examined Microsoft's billing records for any errors and had
 19 discussions with Microsoft's counsel and its employees regarding the nature of the costs
 20 incurred in order to satisfy himself that those costs should be recovered. After analyzing this
 21 voluminous data, Menenberg created summary charts identifying and quantifying each
 22 component of Microsoft's damages claim to assist the jury at trial.

23
 24
 25 ¹ This is at least twice as much time than Motorola's rebuttal expert, Bradley Keller, spent on this matter. *See*
 26 Declaration of Christopher Wion in Support of Microsoft's Opp. to Defs.' Mot. to Exclude and Strike Testimony
 of Todd Menenberg ("Wion Decl.") Ex. 3, Keller Dep. 121:13-15.

Motorola's various attacks on Menenberg's testimony (*see* Dkt. No. 734, Defs.' Mot. to Exclude and Strike Testimony of Todd Menenberg ("Menenberg Mot.)) are without merit. The work Menenberg performed is prototypical damage expert analysis and is admissible. Rule 702 of the Federal Rules of Evidence authorizes an expert to testify if "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702. The Court has broad discretion concerning the admissibility or exclusion of expert testimony and should admit such testimony when it "will assist the trier of fact to understand the evidence." *Wood v. Stihl, Inc.*, 705 F.2d 1101, 1104 (9th Cir. 1983) (quoting Fed. R. Evid. 702).

Accounting expert opinion based on mathematical calculation and analysis is commonplace and falls squarely within the scope of permissible testimony under Rule 702. Motorola's proposed alternative, requiring lay jurors to sort through thousands of pages of documents and prepare their own calculations, is unreasonable, unworkable, and inconsistent with the letter and spirit of Rule 702. Nor would Menenberg's testimony regarding Microsoft's attorneys' fees violate the "advocate witness rule," as Motorola claims. Experts frequently rely upon documents and information supplied to them by counsel in preparing their opinions. Indeed, in a case like this one, there is no other choice: Microsoft and its counsel are clearly in the best position to identify the nature of the legal work that was performed, and its connection to Motorola's breaching conduct. Menenberg is entitled to rely upon those representations and information contained within written legal bills in calculating claimed damages.

Microsoft has already proffered a fact witness—in-house counsel David Killough—who testified at deposition regarding the methodology Microsoft used for identifying which

attorneys' fees and costs are related to the damages claims asserted in this litigation. If Motorola somehow finds fault in that approach, Motorola is free to explore those matters during cross-examination of Microsoft's witnesses. Motorola's mere disagreement with Microsoft's approach to calculating damages is not a basis for seeking a wholesale exclusion of expert testimony.

Moreover, Motorola has not presented any tenable argument why Menenberg's opinions regarding Microsoft's relocation expenses should be excluded. To calculate these damages, Menenberg reviewed numerous Microsoft agreements, invoices, and other financial documents to calculate the damages resulting from the relocation. In addition, Menenberg calculated the difference in fixed and variable costs between the Netherlands and German facilities. Such calculations and opinions are well within scope of permissible opinion testimony from an accounting expert.

II. ARGUMENT

A. Menenberg's Opinions Are Proper Expert Testimony Based On Expert Knowledge And Will Assist The Jury.

Expert testimony is admissible if it falls within the expert's scientific, technical, or specialized knowledge and is helpful to the jury. Fed. R. Evid. 702. Menenberg's opinions are based upon his expertise as an accountant and will assist the jury by preventing the untenable situation where the jury would need to consider the same information that was supplied to Menenberg but would then, on its own, have to segregate, compile and analyze underlying data contained within thousands of pages of documents to calculate Microsoft's damages.

It is well-established that an accounting expert may quantify damages based on mathematical calculation and analysis even where the calculations involve "an exercise in basic math." *WWP, Inc. v. Wounded Warriors Family Support, Inc.*, 628 F.3d 1032, 1040 (8th Cir. 2011) (rejecting a challenge to an accounting experts testimony because "[t]here is not . . . an implicit requirement in Fed. R. Evid. 702 for the proffered expert to make *complicated*

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1 mathematical calculations”). *See also James v. Fenske*, No. 10-CV-02591-WJM-CBS, 2012
 2 WL 2923274, at *1 (D. Colo. July 18, 2012) (holding that testimony from plaintiff’s damages
 3 expert who “compiled three years of pay-related data from the plaintiffs” was admissible even
 4 though the expert’s mathematical calculations were not “conceptually difficult.”). In
 5 performing this type of analysis accountants routinely rely, “surely to no one’s surprise, on the
 6 books and records and financial information . . . provided.” *Id.* (citations omitted). Here,
 7 Menenberg analyzed law firm billing entries in bills and invoice printouts that include nearly
 8 12,000 billing entries for Sidley Austin LLP alone. (Dkt. No. 734 Ex. A Menenberg Report
 9 (“Menenberg Rpt.”) 6–19); Wion Decl. Ex. 1, Excerpts of the June 20, 2013 Deposition of
 10 Todd Menenberg (“Menenberg Dep.”) 43:20–44:17, 51:22–53:22. He performed a review of
 11 the entries and source documents for error and in some cases needed to convert entries from
 12 foreign currency into U.S. dollars. Menenberg Rpt. 12, 13 n. 8, 14–15; Menenberg Dep.
 13 43:20–44:17, 48:2–49:21.

14 Menenberg also segregated and separately analyzed the costs related to Microsoft’s
 15 relocation of the EMEA distribution center and calculated Microsoft’s annual operating cost
 16 damages over a two year period—a period which Menenberg selected as a reasonable and
 17 conservative time frame in light of his accounting expertise. Menenberg Rpt. 19; Menenberg
 18 Dep. 105:23–106:8, 141:18–142:8, 174:5–13. As Motorola concedes, “He had discussions
 19 with counsel and Microsoft employees to ensure that he was satisfied with the documentary
 20 back-up for each cost.” Menenberg Mot. 4. *See Menenberg Dep.* 105:10–107:14. All of this
 21 work enforces the reliability of Menenberg’s testimony. *See Quad/Graphics, Inc. v. One2One*
 22 *Comm’ns, LLC*, 09-CV-99-JPS, 2011 WL 4478440, at *3 (E.D. Wis. Sept. 23, 2011)
 23 (testimony from accountant who “reviewed underlying documents for mathematical accuracy,
 24 traced information to other documents including cost-sharing spreadsheets and invoices, and
 25

1 went over the materials with [client] officials” was admissible because it “provide[d] more
2 than a bottom-line conclusion parroted from numbers provided by [the client]”).

3 To make his calculations and conclusions more readily understandable by the trier of
4 fact, Menenberg prepared a series of summary tables. Menenberg Rpt. 6–7, 19–28. Even
5 leaving aside the accounting expertise that Menenberg brings to bear, the tables are admissible
6 as summary evidence under the purpose and rationale of Fed. R. Evid. 1006 (summaries of
7 voluminous writings). *See WWP*, 628 F.3d at 1040, citing *SEC v. Amazon Natural Treasures,*
8 *Inc.*, 132 Fed. App’x 701, 703 (9th Cir. 2005) (unpub. mem. op.). *See also In re Nat’l*
9 *Consumer Mortgage, LLC*, 2:10-CV-00930-PMP, 2013 WL 164247, at *7 (D. Nev. Jan. 14,
10 2013) (“[I]f [expert’s] charts and graphs are the result of ‘simple math,’ they would be
11 admissible as summary or calculation evidence as a compilation of [client’s] source
12 materials.”).

13 The limited authority Motorola cites attacking Menenberg’s damages expert testimony
14 as improper is inapposite. In *Schiller & Schmidt v. Nordisco Corp.*, 969 F.2d 410 (7th Cir.
15 1992), the court criticized an expert for overstating damages to include lost profits not
16 attributable to the defendant’s conduct, but nonetheless upheld the award in district court based
17 in part on the expert opinion—it certainly did not hold that an accounting expert cannot offer
18 opinions based on mathematical calculations. *See* 969 F.2d at 415. The proffered expert in
19 *Shapiro v. Art Leather, Inc.*, 398 B.R. 564 (Bankr. E.D. Mich. 2008) performed none of the
20 analysis and verification for accuracy that Menenberg did here; rather, he merely added two
21 sets of numbers provided to him by a bankruptcy trustee, and then divided the totals to
22 calculate a percentage. *See* 398 B.R. 564 at 576. These two simple mathematical calculations
23 stand in stark contrast to the more than the tens of thousands of calculations Menenberg had to
24 perform to reach his conclusions—work that it would be wholly impractical for the jury to
25 perform on its own.

1 Finally, *Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052 (4th Cir. 1986) and *Andrews v.*
 2 *Metro N. Commuter R.R. Co.*, 882 F.2d 705, (2d Cir. 1989) are off-point. In *Scott*, the court
 3 excluded expert testimony relating to contributory negligence as inconsistent with Virginia
 4 state law. See 789 F.2d at 1055. In *Andrews*, the court excluded expert testimony on whether
 5 a party acted reasonably by walking along train tracks while intoxicated after falling off a train
 6 platform, since a jury could itself determine whether the party's conduct was reasonable. See
 7 882 F.2d at 708. Here, Menenberg's opinions fall well within his specialized technical
 8 knowledge, are consistent with the law, and will assist the jury in assessing Microsoft's
 9 damages.

10 Motorola's apparent proposal to have the jury analyze thousands of pages of source
 11 data and perform thousands of mathematical calculations itself (*see* Menenberg Mot. 9) is
 12 untenable and unreasonable. Where a jury cannot effectively examine underlying data,
 13 perform calculations, and interpret the calculations, expert testimony is appropriate. See *Scott*
 14 *v. City of Indianapolis*, 1:08-CV-0150-SEB-TAB, 2010 WL 1265990, at *3 (S.D. Ind. Mar. 25,
 15 2010) ("It would be unreasonable to expect a lay jury to effectively examine the data contained
 16 in the Consent Decree reports, calculate the percentages, and interpret their meaning without
 17 the aid of a mathematical expert.").

18 Burdening the jury with reproducing Menenberg's analysis itself—even assuming it
 19 were able to do so—would waste time, delay the conclusion of trial, and increase the risk of
 20 inaccurate results. The jury would need to duplicate the efforts of Menenberg and a support
 21 staff of ten, who spent more than a thousand hours analyzing the underlying data and preparing
 22 damage calculations. Menenberg created an electronic system of data entry with double entry
 23 quality control, did reasonableness check that the time entires were properly included in the
 24 damages calculations, and consulted with Microsoft and its counsel regarding the relevant
 25 factual background. Menenberg Rpt. 7; Menenberg Dep. 43:20–44:17. After performing this

work, Menenberg broke the costs down into summary charts that will be helpful to the jury. Menenberg Report at 6–7, 19–28. Motorola provides no reason why the jury should be required to reinvent the wheel.

This Court’s own experience in similar circumstances counsels strongly against Motorola’s plan to cut out Menenberg and have the jury reproduce the calculations itself:

The court, however, observes that, rather than make an effort at trial to prove the amount of attorney’s fees to which they are entitled, Plaintiffs have simply left the court to sift through hundreds of pages of highlighted invoices from the Hall Zanzig and Stoll Berne law firms dating from September 2007 through June 2009 (Ex. 41) as well as hundreds of pages of pleadings and transcripts from the Washington and Oregon lawsuits (see, e.g., Ex. A–30). Plaintiffs have not identified specific pleadings, hearings, or depositions that involved the “failure to withdraw” issue; nor have they interpreted the attorneys’ notes on their invoices or explained how the attorneys’ efforts, as reflected in the billing records, related to the potentially covered “failure to withdraw” claim. Nevertheless, the court concludes, following its review of the evidence, that Plaintiffs are entitled to reimbursement for a small portion of their claimed attorney’s fees.

Weinstein & Riley, P.S. v. Westport Ins. Corp., No. C08–1694 JLR, 2011 WL 887552, at *23 (W.D. Wash. March 14, 2011). Menenberg’s proposed testimony—supported by his extensive, expert review of the highlighted and allocated invoices from Microsoft and its law firms—provides the fact finder with exactly what the plaintiffs in *Weinstein & Riley* did not. Motorola’s attempt to prevent Microsoft’s expert from offering this assistance to the Court and jury should be rejected.

B. The Advocate Witness Rule Does Not Preclude Menenberg’s Testimony

Motorola’s attempt to exclude Menenberg’s testimony on the basis of the “advocate witness” rule likewise fails. The advocate witness rule provides that “[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness.” Wash. R.P.C. 3.7(a). Because the rule (which incorporates the entirety of ABA Model Rule 3.7 and is common across multiple jurisdictions) interferes with a party’s right to choose an attorney, courts are “very cautious” in applying it to restrict testimony. *See Pesky v. United States*, CIV.

1 1:10-186 WBS, 2011 WL 3204707, at *3 (D. Idaho July 26, 2011). Due to the likelihood that
 2 the rule could be “invoked for tactical advantage, delay, or other improper purposes,” the party
 3 invoking the rule bears the burden of showing “with specificity” that an attorney is “likely to
 4 be a necessary witness” in the case. *Kelly v. CSE Safeguard Ins. Co.*, No. 2:08-cv-00088-
 5 KJD-RJJ, 2010 WL 3613872, at *2 (D. Nev. Sept. 8, 2010), citing *Machea Transp. Co. v.*
 6 *Phila. Indem. Ins. Co.*, 463 F.3d 827, 833 (8th Cir. 2006). Motorola cannot demonstrate that
 7 the rule remotely counsels excluding Menenberg’s testimony in this case.

8 As a threshold matter, Menenberg’s testimony does not even implicate the advocate
 9 witness rule because Sidley attorney Ellen Robbins—whose involvement in reviewing Sidley
 10 invoices is what Motorola apparently objects to—is not “likely to be a necessary witness” in
 11 this case. *See* Wash. R.P.C. 3.7(a). For a lawyer to be “necessary” for the purposes of Rule
 12 3.7, her testimony must be “relevant, material, and unobtainable elsewhere.” *Rothberg v.*
 13 *Cincinnati Ins. Co.*, No. 1:06-CV-111, 2008 WL 2401190, at *2 (E.D. Tenn. June 11, 2008).
 14 This high standard requires showing that an attorney’s testimony would be “strictly
 15 necessary”—the fact that potential testimony from counsel would be relevant, or even “highly
 16 useful” is not enough. *Machea Transp. Co.*, 463 F.3d at 833; *Droste v. Julien*, 477 F.3d 1030,
 17 1035 n. 7 (8th Cir. 2007) (“[A]n attorney is a necessary witness only if there are things to
 18 which he [or she] will be the only one available to testify.”) (quotation marks omitted). An
 19 attorney is not a necessary witness “if other witnesses can testify to matters within his [or her]
 20 knowledge.” *Rothberg*, 2008 WL 2401190, at *2; *accord United States v. Starnes*, No. 04-
 21 60137, 157 Fed. App’x 687, 693–94 (5th Cir. 2005) (“A lawyer is not ‘likely to be a necessary
 22 witness’ when evidence pertaining to each matter to which he could testify is available from
 23 another source.”).

24 Motorola alleges that testimony from Robbins might be relevant to Menenberg’s
 25 testimony because she was involved in assigning the allocations reflected on some of the

1 Sidley invoices that Menenberg reviewed in order to reflect time entries where the task related
 2 to both Motorola's standard-essential patents and non-standard-essential patents—*e.g.*, time
 3 entries relating to the ITC 752 investigation where Motorola asserted 4 SEPs and one non-SEP.
 4 Menenberg Mot. 11. But Motorola never sought to depose Robbins, and does not even attempt
 5 “to show that there is any disputed material fact that can only be proved with [her] testimony.”
 6 *Carta ex rel. Estate of Carta v. Lumbermens Mut. Cas. Co.*, 419 F. Supp. 2d 23, 29 (D. Mass.
 7 2006) (citation omitted). No such showing is possible, because David Killough—Microsoft's
 8 in-house counsel who supervises all of the litigation between Microsoft and Motorola and who
 9 dictated the allocation methodologies Robbins employed—testified as to the basis for the
 10 allocations to which Motorola points. *See, e.g.*, Wion Decl. Ex. 2, Excerpts of the May 6, 2013
 11 Deposition of David Killough at 82–84, 86–95, 118–120. Motorola deposed Killough and
 12 asked him questions regarding the fee allocations, and Microsoft has disclosed Killough as a
 13 trial witness. And Menenberg testified that he understood the allocation methodology and
 14 determined that it was reasonable. Menenberg Dep. 57:16–59:7, 60:20–61:15.

15 Even if the advocate witness rule were relevant here, there is an exception for
 16 “testimony [that] relates to the nature and value of legal services.” Wash. R.P.C. 3.7(a)(2);
 17 *Aecon Bldgs., Inc. v. Zurich N. Am.*, No. C07-832MJP, 2008 WL 2940599, at *2 (W.D. Wash.
 18 July 24, 2008) (holding that testimony from counsel regarding “the nature and values of the
 19 fees his firm charged in [an] underlying matter” was exempted by Rule 3.7(a)(2)); *In re Duke*
 20 *Investments, Ltd.*, 454 B.R. 414, 424 n. 4 (Bankr. S.D. Tex. 2011) (holding that the exception
 21 applied to potential testimony by counsel who compiled the amount of attorney fees sought in
 22 a proof of claim); *National Union Fire Ins. Co. v. L.E. Myers Co. Group*, 937 F. Supp. 276,
 23 280 (S.D.N.Y. 1996) (holding that an attorney's proffered testimony about “attorneys' fees and
 24 costs incurred and paid” by the client in two separate insurance actions “fall[s] squarely”
 25 within the exception). Motorola's argument that the allocations fall outside of the exception

1 because they were connected to the question of proximate causation, Menenberg Mot. 11,
 2 makes no sense. Whether the work was performed in response to Motorola's assertion of
 3 standard-essential patents is absolutely a question of the "nature" of the legal services.

4 **C. Menenberg's Reliance On Data Provided By Sidley And Microsoft Is Both**
 5 **Proper And Commonplace.**

6 The facts and data upon which experts base their opinion "do not have to be personally
 7 known" to them; instead the data may be "made known to [them] by presentation outside of
 8 court and other than by [their] own perception." *Huezo v. Los Angeles Cmty. Coll. Dist.*, No.
 9 CV 04-9772 MMM(JWJX), 2007 WL 7289347, at *2 n.18 (C.D. Cal. Feb. 27, 2007) (holding
 10 that an expert's report, "which relie[d] in part on 'facts and data' gathered by [the expert's]
 11 associates as well as on information provided by plaintiff's counsel, is competent expert
 12 testimony"); *see also Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1142 (9th Cir.
 13 1997) ("The fact that [a proffered expert's] opinions are based on data collected by others is
 14 immaterial."). This is true regardless of whether the source of the expert's data is "the client,
 15 other experts, or counsel." *Inline Connection Corp. v. AOL Time Warner, Inc.*, 470 F. Supp.
 16 2d 435, 443 (D.Del. Jan. 23, 2007); *EEOC v. AutoZone, Inc.*, No. 00-2923 MA/A, 2005 WL
 17 3591641, at *5 (W.D. Tenn. Dec. 29, 2005) (expert testimony in an employment case was
 18 admissible where the expert relied on the defendant's Employer Information Report
 19 classifications).

20 Accordingly, it is entirely proper for Menenberg to rely on the information about the
 21 nature of Sidley's legal services to Microsoft provided by Sidley and Microsoft. Testifying
 22 experts rely on the kinds of facts or data that an expert in the field would reasonably use. Fed.
 23 R. Evid. 703. Invoices prepared by a party and counsel are the most common evidence relied
 24 upon by experts and courts in calculating the award of reasonable fees. *See, e.g., Mathis v.*
 25 *Exxon Corp.*, 302 F.3d 448, 462 (5th Cir. 2002) (district court did not abuse its discretion in
 26 awarding fees based on affidavits by lead counsel and an attorney fees expert); *Schafner v.*

1 *Fairway Park Condo. Ass'n*, 324 F. Supp. 2d 1302, 1310 (S.D. Fla. 2004) (“[A]ttorney fee
 2 awards are generally based on affidavits and billing records.”); *see also CDW LLC v. NETech*
 3 *Corp.*, 906 F. Supp. 2d 815, 822-823 (S.D. Ind. 2012) (finding that a damages expert had not
 4 impermissibly “parroted” plaintiff’s views when the expert relied on plaintiff to “accurately
 5 compile from [its] accounting system the revenue attributable only to [certain] products and
 6 services.”).² Damages experts are routinely permitted to testify about calculations they made
 7 based on financial information that was provided by the party that retained them. *See Platypus*
 8 *Wear, Inc. v. Clarke Modet & Co., Inc.*, No. 06-20976-CIV, 2008 WL 4533914, at *5 (S.D.
 9 Fla. Oct. 7, 2008) (holding that damages calculation by plaintiff’s expert was admissible when
 10 expert performed “pure economic calculations” based on plaintiff’s income ledgers and
 11 forecast sales); *Great N. Storehouse, Inc. v. Peerless Ins. Co.*, No. CIV. 00-7-B, 2000 WL
 12 1900299, at *2 (D. Me. Dec. 29, 2000) (holding that testimony by plaintiff’s expert who relied
 13 on financial figures provided by plaintiff to calculate damages total was admissible); *Deghand*
 14 *v. Wal-Mart Stores*, 980 F. Supp. 1176, 1180-1181 (D. Kan. 1997) (holding that testimony
 15 from plaintiff’s expert who calculated loss of employment damages based on wage and time
 16 data provided by counsel was admissible).

17 Insofar as Motorola alleges a handful of computational errors in the allocation of fees,³
 18 minor errors do not warrant the wholesale exclusion of an expert. The fact that Menenberg
 19

20 ² The two cases Motorola cites are distinguishable because there was substantial extrinsic evidence that the
 21 information provided by counsel was inaccurate or misleading. *See Rojas v. Marko Zaninovich, Inc.*, No. 1:09-
 22 CV-00705 AWI, 2011 WL 4375297, at *4 (E.D. Cal. Sept. 19, 2011) (excluding expert testimony when the expert
 23 relied on a clearly incorrect interpretation of the defendant’s pay code system that had been provided by plaintiffs’
 24 counsel); *Johnson v. Big Lots Stores, Inc.*, No. 04-3201, 2008 WL 1930681, at *15 (E.D. La. April 29, 2008)
 (finding flaws in proffered expert’s survey data that were “legion and cumulative,” including that counsel
 handpicked what was found to be a wholly inadequate number of survey subjects and also that he engaged in
 improper contact with the interviewees). Neither opinion held that expert testimony should be excluded merely
 because the expert relied on information provided by a party or counsel, and Motorola does not identify any
 evidence that the Sidley invoices contained “legion and cumulative” errors, or that Menenberg interpreted them
 incorrectly.

25 ³ Microsoft seeks reimbursement as damages from Motorola amounts reflected by approximately 11,705 Sidley
 26 Austin billing entries. Motorola has identified fewer than ten errors in the allocation/color coding process.

1 searched for the existence of any errors in the documentation that was provided and made
 2 adjustments to his calculations illustrates that Menenberg did not simply parrot Microsoft's
 3 views. Moreover, Motorola's criticisms of the data Menenberg used go at most to the weight
 4 of his testimony, not its admissibility. *See Primrose Operating Co. v. Nat'l Am. Ins. Co.*, 382
 5 F.3d 546, 562 (5th Cir. 2004) (holding that allegations that the data relied on by an attorney
 6 fees expert did not clearly demarcate fees attributable to a specific defendant were not grounds
 7 for exclusion, but were for the jury to consider). *See also Khadera v. ABM Indus. Inc.*, No.
 8 C08-0417RSM, 2011 WL 6813454, at *3 (W.D. Wash. Dec. 28, 2011) (claimed "weaknesses
 9 in the factual basis of an expert witness' opinion" go to the weight of the evidence, not its
 10 admissibility); *CDW LLC*, 906 F. Supp. 2d at 823 (alleged inaccuracies in plaintiff's compiling
 11 of revenue data for use by expert witness were "matters for cross-examination"); *United States*
 12 *v. Davis*, 826 F.Supp. 617, 624 (D.R.I. 1993) (criticisms "as to minor errors and methodology"
 13 of expert report "do not impugn [its] overall reliability;" concerns may be addressed at trial by
 14 attacking the weight of the evidence). Even if Motorola were correct that Microsoft and Sidley
 15 made a very small number of clerical errors in the allocation process, Menenberg's testimony
 16 is still admissible evidence on which the jury may base a damages award including attorney's
 17 fees. *See, e.g., In re Bailey*, 451 B.R. 640, 646 (Bankr. S.D. Ga. 2011) (awarding fees based
 18 on testimony from an expert who reviewed time records provided by counsel subject to a
 19 computational error that the court corrected).

20 Finally, the allocation methodology was applied only to certain Sidley time entries
 21 where the task related to Motorola's assertion of both SEPs and non-SEPs. No allocations
 22 were done on any of the invoices from Microsoft's other four law firms: Calfo Harrigan Leyh
 23 & Eakes LLP, Boehmert & Boehmert, Freshfields Bruckhaus Deringer, and Klarquist
 24 Sparkman LLP. There is absolutely no basis to exclude Menenberg's opinions with respect to
 25
 26

1 Microsoft's claimed damages relating to attorneys' fees from these firms or from the non-
2 allocated Sidley time entries.

3 **D. There is No Basis to Preclude Menenberg's Testimony on Damages Relating**
4 **to Microsoft's Relocation of its Distribution Facility.**

5 Motorola has not presented any legitimate basis to preclude Menenberg's opinions
6 regarding Microsoft's relocation-related damages. To calculate these damages, Menenberg
7 and his staff reviewed hundreds of invoices, interviewed Microsoft personnel, calculated
8 exchange rates, and compared fixed and variable costs between the facilities – the type of work
9 damages experts routinely perform in preparing damages calculations. And in calculating the
10 relocation damages, Menenberg did not rely upon work performed by counsel. Accordingly,
11 there are no grounds to exclude Menenberg's testimony relating to Microsoft's relocation
12 damages.

13 **E. Motorola's Request for a Preclusion Order is Premature.**

14 Finally, Motorola makes a blanket request that the Court preclude Menenberg from
15 offering opinions that are not stated in his expert report—specifically, opinions that
16 Microsoft's claim for attorney's fees is reasonable and that Motorola's alleged conduct caused
17 Microsoft to relocate its EMEA distribution facility. Menenberg Mot. 12. As a threshold
18 matter, Menenberg's report does not need to include verbatim what he might say on the stand
19 in response to questions that may be asked at trial. *See, e.g., Walsh v. Chez*, 583 F.3d 990, 994
20 (7th Cir. 2009) ("The purpose of these reports is not to replicate every word that the expert
21 might say on the stand. It is instead to convey the substance of the expert's opinion (along
22 with the other background information required by Rule 26(a)(2)(B) so that the opponent will
23 be ready to rebut, cross-examine, and to offer a competing expert if necessary."). Rule
24 26(a)(2)(B) "does not limit an expert's testimony simply to reading his report. No language in
25 the rule would suggest such a limitation. The rule contemplates that the expert will
26 supplement, elaborate upon, explain and subject himself to cross-examination upon his report."

1 *Thompson v. Doane Pet Care Co.*, 470 F.3d 1201, 1203 (6th Cir. 2006). Thus, it would be
 2 premature for the Court to prohibit Menenberg from testifying about subject matters that
 3 Motorola may choose to broach on cross-examination. *See Therasense, Inc. v. Becton,*
 4 *Dickinson & Co.*, 2008 WL 2037732 at *5 (N.D. Cal. 2008) (“If opposing counsel, however,
 5 “opens the door” on cross examination, however, then the expert may address issues beyond
 6 those in the report.”). Indeed, the testimony cited in Motorola’s motion was elicited in
 7 response to Motorola’s own inquiries. *E.g.*, Menenberg Dep. 61:2–24 (“I don’t state that in the
 8 report, but you asked my opinion whether I think [Microsoft’s methodology for calculating
 9 fees] is reasonable. I think it’s a reasonable approach.”).

10 **III. CONCLUSION**

11 For the foregoing reasons, Motorola’s motion to exclude and strike Menenberg’s
 12 testimony should be denied.

13 DATED this 12th day of July, 2013.

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CERTIFICATE OF SERVICE

I, Florine Fujita, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.

2. On the 12th day of July, 2013, I caused the preceding document to be served on counsel of record in the following manner:

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